

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

MICHAEL KENNETH ROSE

Case No. 04-31145

Debtor

PEGGY ANN BUCKNER

Case No. 04-31270

Debtor

CLYDE E. STEELE

Case No. 04-31327

Debtor

DOUGLAS RAY SMITH

Case No. 04-31499

Debtor

INGRID ANNA LYNCH  
a/k/a INGRID ANNA BEVERLY

Case No. 04-31700

Debtor

HEATHER RHANAE BARNETTE

Case No. 04-31701

Debtor

CLAUDIA SEBRING

Case No. 04-31752

Debtor

SILIA JEAN JACKSON

Case No. 04-31905

Debtor

**MEMORANDUM ON MOTION TO STRIKE**

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**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

Before the court is the Motion to Strike Pursuant to Rule 9018 (Motion to Strike) filed by Richard F. Clippard and Patricia C. Foster on July 8, 2004, requesting that the court deny and strike the Motion of Kristin Motley d/b/a We the People Forms and Service Center of Knoxville For an Order to Show Cause (Show Cause Motion) filed on May 5, 2004.<sup>1</sup> Richard F. Clippard (Clippard) is the United States Trustee for Region 8, and Patricia C. Foster (Foster) is the attorney for the United States Trustee, serving in the court's Northern and Northeastern Divisions.

## I

Kristin Motley (Ms. Motley) is a bankruptcy petition preparer, as defined in 11 U.S.C.A. § 110(a)(1) (West 1994 & Supp. 2004), owning and operating We the People Forms and Service Center of Knoxville (We the People of Knoxville), a franchise of We the People Forms & Service Centers USA, Inc. Each of the eight Debtors named in the caption paid Ms. Motley fees totaling \$214.00 for the preparation of their respective Chapter 7 bankruptcy documents. Following the filing of these Chapter 7 cases, the court, on April 9 and May 17, 2004, entered Orders, sua sponte, directing Ms. Motley to file documentation regarding her document preparation services for the Debtors' cases and to appear for a hearing to allow the court to determine whether the fees charged were excessive and whether she should be

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<sup>1</sup> The Motion to Strike was joined with the Response of Patricia C. Foster and Richard F. Clippard to Motion of Kristin Motley d/b/a We The People Forms and Service Center of Knoxville For an Order to Show Cause.

enjoined from activities resulting in future violations of § 110.<sup>2</sup> After a hearing held on July 13, 2004, the court issued its ruling on the issues raised in the April 9 and May 17, 2004 Orders. *See In re Rose*, No. 04-31145, slip op. (Bankr. E.D. Tenn. Aug. 18, 2004).

By the Show Cause Motion, Ms. Motley requests that Clippard and Foster be required to show cause why they should not be held in contempt of court. In support of her claim of contempt, Ms. Motley alleges that Clippard and Foster have abused their offices and acted improperly by (1) singling out Ms. Motley's customers, advising them to reject Ms. Motley's and We the People of Knoxville's services; (2) maligning We the People of Knoxville; (3) advising We the People of Knoxville's customers that they must engage an attorney to commence a bankruptcy case; (4) recommending to We the People of Knoxville's customers the services of specific attorneys; (5) treating debtors that utilized Ms. Motley's and We the People of Knoxville's services rudely, in contrast to debtors not using their services; (6) telling debtors that they, Ms. Motley, and We the People of Knoxville are abusing the bankruptcy system; and (7) advising debtors that they should sue Ms. Motley and We the People of Knoxville.

Clippard and Foster filed their Motion to Strike, arguing that the Show Cause Motion should be denied because Ms. Motley does not have standing to request the relief sought therein and because Ms. Motley does not allege any violation of the Bankruptcy Code. Clippard and Foster also assert that Ms. Motley's claims are barred by the Federal Tort Claims

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<sup>2</sup> The May 17, 2004 Order added within its terms three (3) Chapter 7 cases that were filed after the original eight (8) cases that were included within the April 9, 2004 Order. The three (3) additional cases were not included by Ms. Motley in her Show Cause Motion.

Act and sovereign immunity. Finally, Clippard and Foster urge the court to strike the Show Cause Motion pursuant to Federal Rule of Bankruptcy Procedure 9018 because of its defamatory content.

## II

Ms. Motley asks the court to find Clippard and Foster in contempt pursuant to 11 U.S.C.A. § 105(a), which provides, in material part:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C.A. § 105(a) (West 1993). Through § 105(a), Congress has provided the bankruptcy courts with inherent powers in order to uphold the provisions of the Bankruptcy Code. *Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327, 336 (2d Cir. 1999) (“The basic purpose of section 105 is to [provide] the bankruptcy courts [with the] power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.”) (quoting 2 COLLIER ON BANKRUPTCY ¶ 105-5 to -7 (Lawrence P. King ed., 15<sup>th</sup> ed. 1999)).

Nevertheless, § 105(a)’s equitable powers may only be “exercised within the confines of the Bankruptcy Code” in furtherance of the goals therein. *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 2004 WL 1671994, 2004 U.S. App. LEXIS 15494, at \*10 (6<sup>th</sup> Cir. July 28, 2004) (quoting *Norwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 969 (1988)). Section 105(a) cannot, in and of itself, create a private cause of action;

it must be invoked in connection with another section of the Bankruptcy Code. *See Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6<sup>th</sup> Cir. 2000); *Yancy v. Citifinancial, Inc. (In re Yancy)*, 301 B.R. 861, 868 (Bankr. W.D. Tenn. 2003). In other words, § 105(a) does not grant bankruptcy courts the authority to step outside the scope of the Bankruptcy Code in order to accomplish its goals.

Congress established the United States trustee program in 1978 “to aid in the administration of bankruptcy cases, . . . to be independent of direct court supervision,” and to act in a role similar to that of a prosecutor. *Morgenstern v. Revco, D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6<sup>th</sup> Cir. 1990) (citing H. REP. NO. 595, 95th Cong. 88-99, 2d Sess. 404, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6049-60); *see also Balser v. Dept. of Justice*, 327 F.3d 903, 909 (9<sup>th</sup> Cir. 2003). The intended purpose of a United States trustee is that of a “watchdog rather than an advocate.” *Revco, D.S., Inc.*, 898 F.2d at 500. “As Congress has stated, the U.S. trustees are responsible for ‘protecting the public interest and ensuring that bankruptcy cases are conducted according to law.’” *Revco, D.S., Inc.*, 898 F.2d at 500 (quoting H. REP. NO. 595 at 109, *reprinted in* 1978 U.S.C.C.A.N. 6070).

United States trustees are appointed by the United States Attorney General, who also has the power to remove any trustee so appointed. 28 U.S.C.A. § 581(a), (c) (West 1993). The duties of a United States trustee include, among other things, establishing and supervising a panel of Chapter 7 trustees and supervising the administration of cases under all chapters

of the Bankruptcy Code concerning applications for compensation, as well as criminal violations of the Bankruptcy Code. *See* 28 U.S.C.A. § 586 (West 1993 & Supp. 2004).

Within the express provisions of the Bankruptcy Code itself, a United States trustee is authorized to appear and raise issues in bankruptcy cases and adversary proceedings. 11 U.S.C.A. § 307 (West 1993). The United States trustees “convene and preside at . . . meeting[s] of creditors,” although this duty may be delegated to case or standing trustees, and the United States trustee may examine any debtor at this meeting of creditors. 11 U.S.C.A. § 341(a) (West 1993); 11 U.S.C.A. § 343 (West 1993). In addition, if necessary, a United States trustee may actually serve as the case trustee in a bankruptcy case. 11 U.S.C.A. § 321(c) (West 1993); 11 U.S.C.A. § 322(b) (1) (West 1993); 11 U.S.C.A. § 703(c) (2) (West 1993).

Assuming the allegations set forth by Ms. Motley in the Show Cause Motion are true, she has not cited to a violation of any section of the Bankruptcy Code, nor does the court ascertain a violation of any section by implication. As such, the court is not authorized by § 105(a), alone, to order Clippard and Foster to appear and show cause, much less to hold them in contempt of court upon proof that any of the allegations set forth in Ms. Motley’s Show Cause Motion are valid.

Furthermore, even if Ms. Motley were to properly link her requested § 105(a) relief with another section of the Bankruptcy Code, the court finds that she does not possess the proper standing to make such a request. Standing is a prerequisite for subject matter

jurisdiction in the federal courts, requiring a party to allege an actual case or controversy. U.S. CONST. art. III, § 2, cl. 1; *O'Shea v. Littleton*, 94 S. Ct. 669, 675 (1974). It “is an element of federal subject matter jurisdiction which cannot be waived and may be raised at any time by a party or by the court.” *Yates v. Forker (In re Patriot Co.)*, 311 B.R. 71, 74 (B.A.P. 8<sup>th</sup> Cir. 2004) (citing *Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8<sup>th</sup> Cir. 1998)).

In order to satisfy the mandates of Article III, a party seeking redress against another must “demonstrate (1) actual or threatened injury which is (2) fairly traceable to the challenged action and (3) a substantial likelihood the relief requested will redress or prevent the plaintiff’s injury.” *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 488-89 (6<sup>th</sup> Cir. 2004). Put another way, “[s]tanding depends on ‘whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal jurisdiction and to justify exercise of the court’s remedial powers on his behalf.’” *Newport Acquisition Co. No. 1, L.L.C. v. Schiro (In re C-Power Prods., Inc.)*, 230 B.R. 800, 804 (Bankr. S.D. Tex. 1998) (quoting *In re Pointer*, 952 F.2d 82, 85 (5<sup>th</sup> Cir. 1992)).

Along those lines, standing requires “more than just pleading requirements.” *Airline Prof’ls Ass’n of the Int’l Bhd. of Teamsters, Local Union No. 1224 v. Airborne, Inc.*, 332 F.3d 983, 987 (6<sup>th</sup> Cir. 2003). “Rather, ‘each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.’” *Airborne, Inc.*, 332 F.3d at 987 (quoting *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992)). “A plaintiff bears the



burden of demonstrating standing and must plead its components with specificity.” *Coal Operators & Assocs., Inc. v. Babbitt*, 291 F.3d 912, 916 (6<sup>th</sup> Cir. 2002). Accordingly, as the party asserting standing, Ms. Motley must prove that she will sustain a direct injury that is not “hypothetical” but “real and immediate.” *Airborne, Inc.*, 332 F.3d at 987 (quoting *O’Shea*, 94 S. Ct. at 675). Moreover,

[i]n addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. First, a plaintiff must “assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 95 S. Ct. 2197, 2205 (1975) (citations omitted). Second, a plaintiff’s claim must be more than a “generalized grievance” that is pervasively shared by a large class of citizens. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 102 S. Ct. 752, 759 (1982). Third, in statutory cases, the plaintiff’s claim must fall within the “zone of interests” regulated by the statute in question. See *id.* These additional restrictions enforce the principle that, “as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.” *Pestak v. Ohio Elections Comm’n*, 926 F.2d 573, 576 (6th Cir.1991).

*Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6<sup>th</sup> Cir. 1999).

“In the Bankruptcy Code, Congress has expanded standing to the full extent permitted by Article III. For contested matters in a bankruptcy case, any party in interest may be heard, provided that party in interest has standing under Article III.” *C-Power Prods., Inc.*, 230 B.R. at 804. Therefore, in the context of Ms. Motley’s Show Cause Motion, the question is “[c]an the Bankruptcy Code be properly understood as granting [Ms. Motley, a bankruptcy petition preparer], the right to seek judicial relief in this court for [the] alleged [conduct by Clippard and Foster].” *Barnett Bank of S.E. Ga., N.A. v. Trust Co. Bank of S.E. Ga., N.A. (In re Ring)*, 178 B.R. 570, 575 (Bankr. S.D. Ga. 1995).

The Bankruptcy Code does not specifically define who is a “party in interest,” but generally, a “party in interest” in bankruptcy cases is “one whose pecuniary interest is directly affected by the bankruptcy proceeding.” BLACK’S LAW DICTIONARY 1122 (6<sup>th</sup> ed. 1990) (citing *In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980)); see also *Armstrong v. Rushton (In re Armstrong)*, 303 B.R. 213, 219 (B.A.P. 10<sup>th</sup> Cir. 2004). A party in interest may be “the debtor, the trustee, the creditors’ committees, the equity security holders’ committees, the creditors, the equity security holders, and the indenture trustees.” 11 U.S.C.A. § 1109(b) (West 1993) (stating which parties may be heard in Chapter 11 cases). Creditor is defined in the Bankruptcy Code as “[an] entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.” 11 U.S.C.A. § 101(10)(A). A claim is defined as “[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]” 11 U.S.C.A. § 101(5)(A).

Ms. Motley does not have standing to maintain the Show Cause Motion against Clippard and Foster. First, Ms. Motley has not demonstrated any injury or threatened injury that is clearly traceable to actions taken by Clippard and Foster. Even if Ms. Motley’s allegations are accepted as true, any of the comments made by Clippard and Foster to debtors after they have already utilized Ms. Motley’s services are irrelevant as they relate to employment of Ms. Motley and We the People of Knoxville. All Ms. Motley is permitted to do under § 110 of the Bankruptcy Code is type statements and schedules for prospective debtors. See *Rose*, slip op. at 64. Any payment for services rendered by Ms. Motley were paid

in full by the Debtors prior to their filing for bankruptcy. Since that typing service has concluded, Ms. Motley is no longer involved with the Debtors. Because she was paid prior to their bankruptcy filings, she is not a creditor, does not hold a claim, and, in fact, enjoys no additional relationship with any of the Debtors following her typing services.

Second, Ms. Motley is not the proper party to seek redress against Clippard and Foster for their alleged treatment of and statements to debtors following the commencement of their bankruptcy cases. Again assuming that the allegations in Ms. Motley's Show Cause Motion are true, none are based upon any first-hand knowledge of Ms. Motley, nor do any reflect direct actions taken against Ms. Motley. Instead, all of the allegations concern either statements that Clippard and Foster are alleged to have made to unidentified debtors or ways that those debtors, who are presumably her former customers, have been treated. These are, however, simply blanket statements, without any specificity or proof in support thereof. If Clippard and Foster have treated former customers of We the People of Knoxville differently from other debtors through their words and actions, the affected debtors would be the proper parties to bring these actions to the court's attention, supported by proof of such conduct. Ms. Motley's Show Cause Motion attempts to assert legal rights of other parties, something which she cannot constitutionally do.<sup>3</sup>

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<sup>3</sup> Because the court finds that Ms. Motley did not have an adequate basis for her Show Cause Motion, in addition to lacking the standing therefor, it is not necessary for the court to address the claims asserted by Clippard and Foster regarding sovereign immunity and/or the Federal Tort Claims Act. Nevertheless, the court will point out that the doctrine of sovereign immunity does apply to the United States trustee, that a waiver of sovereign immunity must be explicitly and unequivocally expressed, and that performance of his proscribed duties does not constitute an express waiver of sovereign immunity by the United States trustee. See *Balser*, 327 F.3d at 907-08 (citing *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-15 (1992)).

### III

Clippard and Foster also urge the court to strike the Show Cause Motion, arguing that it is defamatory and creates an impression that they intentionally engaged in wrongful conduct, based upon Ms. Motley's statements, which are grounded solely upon hearsay. Ms. Motley opposes the Motion to Strike on the basis that the allegations in her Show Cause Motion simply raise issues of fact and are not defamatory.

The Motion to Strike is based upon Rule 9018 of the Federal Rules of Bankruptcy Procedure, which allows the court to "make any order which justice requires . . . to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code[.]" FED. R. BANKR. P. 9018. *See also* 11 U.S.C.A. § 107(b)(2) (West 1993) ("On request of a party in interest, the bankruptcy court shall, . . . protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title."); FED. R. CIV. P. 12(f) ("[T]he court may order stricken from any pleading any . . . scandalous matter."). Motions to strike are within the discretion of the court but are generally disfavored absent the necessity to protect a party from harm. *In re Sherman-Noyes & Prairie Apts. Real Estate Inv. P'ship*, 59 B.R. 905, 909 (Bankr. N.D. Ill. 1986).

The Bankruptcy Code does not define "scandalous or defamatory" matter; however, the court may look to state law governing the tort of defamation for guidance. In Tennessee, a defamation action focuses on whether a person's "character and reputation" have been injured. *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 820 (Tenn.

1994); *see also Sullivan v. Baptist Mem. Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999) (setting forth the elements necessary for establishing a prima facie case of defamation in Tennessee). Similarly, Black's Law Dictionary defines "defamation" as "that which tends to injure reputation; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." BLACK'S LAW DICTIONARY 417 (6<sup>th</sup> ed. 1994); *see also* BLACK'S LAW DICTIONARY 427 (7<sup>th</sup> ed. 1999 (defining "defamation" as "[a] false written or oral statement that damages another's reputation.")).

For the purposes of the Motion to Strike, the ultimate question to be decided is whether a "reasonable person could alter their opinion of [Clippard and Foster] on the basis of [Ms. Motley's] allegations made in the context of which they appear[.]" *In re Commodore Corp.*, 70 B.R. 543, 546 (Bankr. N.D. Ind. 1987). The court believes that this question is answered in the affirmative, and thus, the Motion to Strike should be granted.

As previously discussed, one of the United States trustee's primary roles is that of a "watchdog" over the administration of bankruptcy cases. In order to properly serve in that capacity, it is imperative that all parties in interest to bankruptcy cases, but most specifically debtors, understand that the United States trustee is an ally, there to protect the debtors' interests throughout the pendency of their bankruptcy cases. Any allegations of wrongdoing or contemptuous conduct, especially when those allegations are wholly unsupported, undermine the ability of Clippard and Foster to properly perform their duties. As such, the court believes that the statements made in Ms. Motley's Show Cause Motion could cause

debtors to unfairly alter their opinion of Clippard and Foster and their purpose in the administration of bankruptcy cases, resulting in debtors being uncomfortable around or weary of the United States trustee. This possible and unnecessary result, based upon unsupported statements made by Ms. Motley, a party without standing who has requested relief that is not based upon any provision of the Bankruptcy Code, would be counter-productive to the bankruptcy process.

In summary, the Motion to Strike will be granted, and Ms. Motley's Show Cause Motion shall be denied as a matter of law, and shall be stricken from the record in these bankruptcy cases.

An order consistent with this Memorandum will be entered.

FILED: August 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

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Case No. 04-31905

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**ORDER**

For the reasons set forth in the Memorandum on Motion to Strike filed this date, the court directs the following:

1. The Motion to Strike Pursuant to Rule 9018 filed on July 8, 2004, by Richard F. Clippard, United States Trustee for Region 8, and Patricia C. Foster, Attorney for the United States Trustee, jointly with the Response of Patricia C. Foster and Richard F. Clippard to Motion of Kristin Motley d/b/a We the People Forms and Service Center of Knoxville for an Order to Show Cause, is GRANTED.

2. The Motion of Kristin Motley d/b/a We the People Forms and Service Center of Knoxville for an Order to Show Cause filed by Kristin Motley on May 5, 2004, is DENIED and is STRICKEN from the record in these eight (8) Chapter 7 bankruptcy cases.

3. The October 18, 2004 hearing on the Motion of Kristin Motley d/b/a We the People Forms and Service Center of Knoxville for Order to Show Cause filed by Kristin Motley on May 5, 2004, is STRICKEN.

SO ORDERED.

ENTER: August 26, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE